

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

CITI TRENDS, INC.

and

Case 10–CA–133697

DEDRICK PETERKIN, an Individual

Michael W. Jeannette, Esq.,
for the General Counsel.
Edward M. Cherof, Esq.
(*Jackson Lewis P.C.*),
for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case is before me on the parties' January 2, 2015 joint motion to waive a hearing and have a decision based on a stipulated record,¹ and Associate Chief Judge William N. Cates' January 12, 2015 order accepting the motion, setting a briefing schedule, and designating me as the judge to prepare the decision. On February 23, 2015, the General Counsel and the Respondent timely filed briefs, which I have duly considered.

Issues

As stipulated, the primary issue is whether the Board's decisions in *D. R. Horton*² and *Murphy Oil*³ should be applied to find that Citi Trends, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining a mandatory arbitration agreement (MAA) that provides for arbitration of employment disputes on an individual basis.

¹ Jt. Exh. 1 (hereinafter the stipulation).

² 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), pet. for rehearing en banc denied (5th Cir. No. 12-60031, April 16, 2014).

³ 361 NLRB No. 72 (2014).

The Respondent also contends that the complaint is barred by Section 10(b) of the Act because the underlying charge was filed more than 6 months after the Charging Party signed the MAA in question.

5 Stipulated Facts

10 The Respondent, a Delaware corporation, operates retail clothing stores in 29 states, with 511 locations, and maintains distribution warehouses in South Carolina and Oklahoma. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15 At all material times through the present, Respondent has required employment applicants and current employees at its retail sales and distribution warehouses to sign a document titled “Arbitration Agreement” (mandatory arbitration agreement or MAA), which requires employees to waive their right to pursue certain class and collective actions before an arbitrator and mandates that certain employment-related disputes be arbitrated rather than litigated in a court of law.⁴ Relevant portions of the MAA are as follows:

20 Class/Collective Action Waiver

This Agreement requires all claims to be pursued on an individual basis only. You and the Company hereby waive all rights to (i) commence, or be a party to, any class, representative or collective claims or (ii) jointly bring any claim against each other with any other person or entity. You and the Company must pursue
25 any claim on an individual basis only, including claims alleging a pattern and practice of unlawful conduct. In addition, the inability to join others in a claim for pattern and practice violations shall not by itself constitute a bar to the pursuit of such a claim.

30 Lastly, nothing herein limits your right and the rights of others to collectively challenge the enforceability of this Agreement, including the class/collective action waiver. Notwithstanding, the Company will assert that the parties have agreed to pursue all claims individually in the arbitral forum and may ask a court to compel arbitration of each individual’s claims. To the extent that the filing of
35 such an action is concerted activity protected under the National Labor Relations Act, such filing will not result in threats, discipline or discharge.

* * *

40 Receipt and Acknowledgement

By your signature below, you acknowledge receipt of this Arbitration Agreement. You also acknowledge that this Agreement is a legal document which, among other things, requires you to arbitrate, all claims you may have now or in the future with the Company, which otherwise could have been brought in court.
45

⁴ Stipulation, Exh. 2.

I knowingly and freely agree to this mutual agreement to arbitrate claims, which otherwise could have been brought in court. I affirm that I have had sufficient time to read and understand the terms of this agreement and that I have been advised of my right to seek legal counsel regarding the meaning and effect of this agreement prior to signing. By issuance of this agreement, the company agrees to be bound to its terms without any requirement to sign this agreement. [Emphasis on the form omitted]

G) Either party can reference or rely upon other sections of the Arbitration Agreement in support of its position.

Peterkin began employment at the Respondent’s Darlington, South Carolina distribution warehouse on about November 24, 2008. On October 16, 2012, he signed the above MAA.⁵ His discharge from employment on November 11, 2014 is not pertinent to this matter. He has never filed or pursued a collective action against the Respondent.

Analysis and Conclusions

The Respondent’s 10(b) argument

Section 10(b) of the Act provides that “no complaint shall issue based upon on any unfair labor practice occurring more than six months prior to the filing of the charge. . . .”

The Respondent contends that Section 10(b) bars the General Counsel from pursuing a complaint inasmuch as the charge was filed on July 30, 2014, more than 6 months after Peterkin signed the MAA, on September 16, 2012. However, the Board has long recognized that Section 10(b) does not bar an allegation of unlawful conduct that began more than 6 months before a charge was filed but has continued within the 6-month period. More specifically, Section 10(b) does not preclude a complaint allegation based on the maintenance of a facially invalid rule or policy within the 10(b) period, even if the rule or policy was promulgated earlier and has not been enforced, since “[t]he maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1).” *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), enfd. in part 571 F.3d 53 (D.C. Cir. 2009), citing *Eagle-Picher Industries, Inc.*, 331 NLRB 169, 174 fn. 7 (2000). See also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The Respondent has cited no contrary precedent.

Therefore, I conclude that Section 10(b) does not bar the instant complaint.

The legality of the MAA

The parties agree that if the principles enunciated in *Horton* and *Murphy Oil* govern, the MAA violates Section 8(a)(1) of the Act. Thus, the Respondent does not dispute that the MAA is unlawful under *Horton* and *Murphy Oil*; rather, the thrust of the Respondent’s defense is that those decisions are bad law.

⁵ Stipulation, Exh. 3.

In *Horton*, the Board analyzed an MAA in the context of how the Board decides whether other unilaterally-implemented workplace rules violate Section 8(a)(1), under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board found that the MAA explicitly restricted the exercise of Section 7 rights and was therefore unlawful under the first inquiry set out in *Lutheran Heritage Village*. The Board held that an employer violates Section 8(a)(1) of the Act by “requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial,” because “[t]he right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.” *Horton*, supra, slip op. at 12 (emphasis in original).

The Board further concluded that finding such MAA unlawful was “consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy” and did not “conflict with the letter or interfere with, the policies underlying the Federal Arbitration Act (FAA) [9 U.S.C., § 1 et seq.]. . . .” *Id.*, slip op. at 10.

The Respondent argues that the Fifth Circuit Court of Appeals and other Federal appellate courts have rejected *Horton* to the extent that it found it to be afoul of the Act an MAA prohibiting class action. Thus, the Fifth Circuit concluded that neither the Act’s statutory text nor its legislative history contained a congressional command against application of the FAA and that, in the absence of an inherent conflict between the FAA and the Act’s purpose, an MAA should be enforced according to its terms. 737 F.3d at 361–363. Accordingly, the court denied enforcement of the Board’s order invalidating the MAA.⁶

In *Murphy Oil*, the Board acknowledged the Fifth Circuit’s rejection of the Board’s *Horton* decision on appeal, by a divided panel, as well as decisions of the Second and Eighth Circuits also indicating disagreement with *Horton*, but it cited the well-established rule that “[t]he Board is not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties.” *Murphy Oil*, supra, slip op at 2 fn. 17, citing *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005), and *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066–1067 (7th Cir. 1988). Thus, the Board has explained that it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but will instead respectfully regard such ruling solely as the law of that particular case. See *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993), revd. 60 F.3d 1195 (6th Cir. 1995). See also *D.L. Baker, Inc.*, 351 NLRB 515, 529 at fn. 42 (2007); *Arvin Industries*, 285 NLRB 753, 757 (1987).

The Board in *Murphy Oil* expressly reaffirmed *Horton*, stating that “[t]he rationale of *D. R. Horton* was straightforward, clearly articulated, and well supported at every step.” *Murphy Oil*, supra, slip op. at 6, and that “[w]ith due respect to the courts that have rejected *D. R. Horton*, and to our dissenting colleagues, we adhere to its essential rationale for protecting workers’ core substantive rights under the National Labor Relations Act.” *Id.*, slip op. at 7.

⁶ The court did enforce the Board’s order that Sec. 8(a)(1) had been violated because an employee would reasonably interpret the MAA as prohibiting the filing of a claim with the Board.

Even assuming *arguendo* that I agree with the rationales of the circuit courts that have rejected *Horton*, I am constrained to follow Board precedent that has not been reversed by the Supreme Court or by the Board itself, rather than contrary courts of appeals precedent. See *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004), citing *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963), *enfd.* in part 331 F.2d 176 (8th Cir. 1964); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

The Supreme Court, in upholding the enforcement of individual MAAs in various contexts, has enunciated the general principal that the FAA was designed to promote arbitration. See, e.g., *AT & T Mobility LLC v. Conception*, 131 S.Ct. 1740, 1749 (2011). Moreover, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held that a MAA signed by an employee waived his right to bring a Federal court action under the Age Discrimination in Employment Act. However, as the Board noted in *Horton*, *Gilmer* dealt with an individual claim, and the MAA contained no language specifically waiving class or collective claims; ergo, the Court in *Gilmer* addressed neither Section 7 nor the validity of a class-action waiver. *Horton*, *supra*, slip op. at 12. Inasmuch as the Supreme Court has not specifically addressed the issue of mandatory arbitration provisions that cover class and/or collective actions vis-à-vis the Act, it follows that the Court has not overruled the Board’s *Horton* decision, which I therefore must apply to determine whether the Respondent’s MAA violated Section 8(a)(1) of the Act.

This MAA expressly requires “all claims to be pursued on an individual basis only” and provides that employees “waive all rights to (i) commence, or be a party to, any class, representative or collective claims or (ii) jointly bring any claim against each other with any other person or entity,” including claims alleging a pattern and practice of unlawful conduct. Clearly, the MAA runs afoul of *Horton*’s prohibition against requiring that “employees waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.” *Horton*, *supra*, slip op. at 12.

The MAA contains the caveat that:

[N]othing herein limits your right and the rights of others to collectively challenge the enforceability of this Agreement, including the class/collective action waiver. Notwithstanding, the Company will assert that the parties have agreed to pursue all claims individually in the arbitral forum and may ask a court to compel arbitration of each individual’s claims. To the extent that the filing of such an action is concerted activity protected under the National Labor Relations Act, such filing will not result in threats, discipline or discharge.

This provision fails to cure the defects in the MAA. In *Horton*, the Board analyzed the mitigating effect of language in an MAA that employees have the right to file a class or collective action, including Board charges, challenging the validity of the required waiver. It found such language to lack substance because employees “still would reasonably believe that they were barred from filing or joining class or collective action, as the arbitration agreement . . . still expressly state[s] that they waive the right to do so.” *Horton*, *supra*, slip op. at 9 (fn. omitted). The Board proceeded to explain how such a purported assurance is confusing to employees since “employees [are] told they have the right to do the very thing they waive the right to do. . . .” *Ibid.* See also *Murphy Oil*, *supra*, slip op at 26 (at best, the language creates an

ambiguity, which must be construed against the employer as the drafter), citing *Lafayette Park Hotel*, 326 NLRB 824,828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

Therefore, I conclude that the Respondent violated Section 8(a)(1) of the Act by maintaining, as a condition of employment and continued employment, a mandatory arbitration agreement (MAA) that requires employees to waive their right to pursue collective or class lawsuits and arbitrations, and which employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

Maintained, as a condition of employment and continued employment, a mandatory arbitration agreement (MAA) that requires employees to waive their right to pursue collective or class lawsuits and arbitrations, and which employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷ order

The Respondent, Citi Trends, Inc. Darlington, SC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, as a condition of employment and continued employment, a mandatory arbitration agreement (MAA) that require employees to waive their right to pursue collective or class lawsuits and arbitrations, and which employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the requirement that employees enter into or sign the MAA that is currently in effect as a condition of employment or continued employment, and expunge all such agreements and acknowledgements at any of the Respondent's facilities where the Respondent has required employees to sign such agreements.

(b) Rescind or revise the MAA to make it clear that the agreement does not constitute a waiver of the employees' right to initiate or maintain employment-related collective or class actions in arbitrations and in the courts, or to file unfair labor practice charges with the National Labor Relations Board.

(c) Notify all applicants and current and former employees that the MAA has been rescinded or revised to comport with subparagraph (b), and, if revised, provide them with any revised agreement.

(d) Within 14 days after service by the Region, post at its facilities in Darlington, South Carolina, and any other facilities where MAAs have been maintained as a condition of employment, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 30, 2014, 6 months before the underlying charge was filed.⁹

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁹ See *Eagle-Picher Industries, Inc.*, supra, at 174, 174 fn. 7.

Dated, Washington, DC March 9, 2015

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Ira Sandron
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement (MAA) that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain or enforce an MAA that requires our employees, as a condition of employment and continued employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the requirement that employees enter into or sign the MAA that is currently in effect, or sign acknowledgements relating to it, as a condition of employment, and expunge all such agreements and acknowledgements at all of the Respondent's facilities where the Respondent has required employees to sign such agreements or acknowledgements.

WE WILL rescind or revise the MAA in all its forms to make it clear that the agreement does not constitute a waiver of our employees' right to initiate or maintain employment-related collective or class actions in arbitrations and in the courts, and that it does not restrict our employees' right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign the MAA that the MAA has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

CITI TRENDS, INC.

(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

233 Peachtree Street N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/10-CA-133697 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331-2870.